Supreme Court, U.S.
FILED
SEP 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-209

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1987

SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC, AND STRAIGHT CHIROPRACTIC ACADEMIC STANDARDS ASSOCIATION, INC.,

Petitioners,

v.

AMERICAN CHIROPRACTIC ASSOCIATION INC., THE COUNCIL ON CHIROPRACTIC EDUCATION, INC., NATIONAL BOARD OF CHIROPRACTIC EXAMINERS, AND SID E. WILLIAMS,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

JOHN C. BUTTERS
Counsel of Record
1515 First Atlanta Tower
Atlanta, Georgia 30383
(404) 688-0440

Of Counsel
James F. Ponsoldt
University of Georgia
School of Law
Athens, Georgia

TABLE OF CONTENTS

	PAGE
Table of Authorities	i, ii
The Opinion Below Is In Direct Conflict With Recent Decisions Of The Second And Third Circuits	1 - 3
Whether Exclusionary Standard-Setting Of Combinations Of Professionals Can Be An "Unreasonable" Restraint Of Trade Is An Important, Recurring, Issue That Should Be Decided By This Court	4 - 6
The Recent Wilk Decision Underscores The Importance Of This Case And The Conflicting Treatment Of Professional Boycott Activity By The Lower Courts	6 - 9
The Petition For Writ Of Certiorari Does Not Challenge The Fact Findings Of The Trial Court	9
The Trial Court Found That Defendendants Have Market Dominance	10
Defendants' Conduct Constituted A Horizontal Combination	11-12
State Tort Decisions Do Not Justify Federal Antitrust Violations	12-14
Conclusion	14
Footnote	15

TABLE OF AUTHORITIES

Pages

American Society of Mechanical Engineers v. Hydrolevel Corp., 456 U.S. 556, 102 S. Ct. 1935 (1982).....5,12

Eastern Raliroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965) (Noerr-Pennington Doctrine).....1,2,3

Federal Trade Commission v. Indiana Federation of Dentists, U.S. , 106 S. Ct. 2009 (1986).....6,8,12

Indian Head v. Allied Tube & Conduit Corp., F.2d , 1987-1 Trade Cases Paragraph 67,547 (2nd Cir. 1987), Cert. filed 7-23-87.....1

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978).....12,13

NCAA v. Board of Regents, 468 U.S. 85, 104 S. Ct. 2948 (1984).....5,12,

U.S. v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980)...12

TABLE OF AUTHORITIES (Continued)

Pages

Wilk v. American Medical Assn., 719 F.2d 207 (7th Cir. 1983), Cert. Denied 104 S. Ct. 2399.....5,6,7,13

Wilk v. American Medical Assn., __F.Supp.__, 1987-2 Trade Cases Paragraph 67,689 (N.D. Ill. Sept. 1987).....6,7,8

REPLY BRIEF OF PETITIONERS

I. THE OPINION BELOW IS IN DIRECT CONFLICT WITH RECENT DECISIONS OF THE SECOND AND THIRD CIRCUITS

None of the defendants cite Indian Head, v. Allied Tube & Conduit Corp. ___F.2d___,1987-1 Trade Cases Paragraph 67,547, (2nd Cir. 1987), cert. filed 7-23-87, or Pa. Dental Ass'n et al. v. Medical Services Ass'n of Pa. et al., 815 F.2d 270 (3rd Cir. 1987). Yet at pages 13 of its brief defendant CCE seems to suggest that the opinion of the trial court, as affirmed by the Eleventh Circuit, is not in conflict with Indian Head or Pa. Dental Ass'n. CCE now contends that the court in the present case did not extend Noerr-Pennington immunity to the CCE standard-setting or to CCE's attendant decision to exclude colleges like Sherman who refused to adhere to those standards.

Yet, CCE gave the distict court's

ruling a contrary interpretation in its brief to the Eleventh Ciruit, at a time when the Second Circuit's decision in Indian Head and the Third Circuit's decision in Pa. Dental Ass'n had not yet been rendered. In its brief to the Eleventh Circuit, CCE highlighted that Noerr-Pennington protected all its activities. A heading in its brief to the Eleventh Circuit, states:

> Defendants' Petitioning and Other Activities, Were Protected by the Noerr-Pennington Doctrine (emphasis added)

(Brief of Defendant - Appellee the Council on Chiropractic Education, Inc. - Eleventh Circuit page 26,). CCE's brief to the Eleventh Circuit at page 26 went on to argue:

> "Plaintiffs also complain of CCE's accreditation decisions,.... As the District Court recognized, all of these activities come squarely within the protection from antitrust liability, provided by the Noerr-Pennington, doctrine." (emphasis added)

As discussed in the Petition for Writ of Certiorari, the lower court incorrectly excused all plaintiffs claims, including the challenge to the CCE's anti-competitive exclusionary standards as being immune under the Noerr-Pennington doctrine. The ruling is an improper extension of the Noerr-Pennington doctrine, and is in direct conflict with the Second Circuit holding in Indian Head, supra, and the holding of the Third Circuit in Pa. Dental Ass'n., supra.

II. WHETHER EXCLUSIONARY STANDARD-SETTING OF COMBINATIONS OF PROFESSIONALS CAN BE AN "UNREASONABLE" RESTRAINT OF TRADE IS AN IMPORTANT, RECURRING, ISSUE THAT SHOULD BE DECIDED BY THIS COURT

At page 9 of its brief, defendant CCE states:

> CCE's accreditation standards and the standards of other standard-setting organizations are necessarily "exclusionary" because all standards exclude those colleges, products, or services that fail to measure up.

Without citing any legal authority, CCE is arguing that the establishment of standards by standard-setting organizations is inherently exclusionary but is per se legal. This is untrue. Proper standard-setting is informative and pro-competitive. Standard-setting designed to restrict competition lacks informational values, restricts consumers choice, and should carry with it a proscription of unreasonableness. This Court has repeatedly announced that

because standard-setting organizations are comprised of competitors and, are a potential breeding ground for anticompetitive activity, such organizations and their standards should be subject to close antitrust scrutiny.

In American Society of Mechanical Engineers v. Hydrolevel Corp., 456 U.S. 556, 102 S.Ct. 1935 (1982) this Court specifically cautioned:

> "...[A] standard-setting organization like ASME can be rife with opportunity for anticompetitive activity.

102 S. Ct. at 1945. The activities and standards of such organizations must be scrutinized with respect to anticompetitive purpose or effect, NCAA v. Board of Regents supra, and the standards must be the least restrictive of competition, Wilk v. American Medical Assn. 719 F2d 207 (7th Cir. 1983), cert. denied 104 S. Ct. 2399. Once plaintiffs prove standards have been created

with an anticompetitive purpose or effect, the burden is on the defendants to justify the "exclusionary" standards in terms of their value to the existance and continuation of the market", rather than by vague notions of "public safety". Federal Trade Commission v. Indiana Federation of Dentists, __U.S.__, 106 S. Ct. 2009 (1986).

III. THE RECENT WILK DECISION UNDERSCORES THE IMPORTANCE OF THIS CASE AND THE CONFLICTING TREATMENT OF PROFESSIONAL BOYCOTT ACTIVITY BY THE LOWER COURTS

The defendants arguments and the written opinion of the trial court which was adopted by the Eleventh Circuit are in direct conflict with the very recent ruling of the district court in Wilk v. American Medical Assn., __F. Supp.__, 1987-2 Trade Cases Paragraph 67,689 (N.D.Ill. Sept 1987). Ironically, the ACA and other defendants in the present case supported the plaintiffs' boycott claims in Wilk. The plaintiff

chiropractors in Wilk accused organizations in the medical profession of virtually identical boycott activity to that of the defendants in the case at bar. Recently, Judge Getzendanner in Wilk et. al., v. American Medical Association, supra, found the AMA and other defendants, through activities nearly identical to the undisputed exclusionary activities of the defendants in the case at bar, engaged in a "systematic, long-term intent to destroy a licensed profession..." Wilk, at pg. 48, Trade Cases at pg. 58,547.

Furthermore, consistent with the recent Supreme Court opinion in Federal Trade Commission v. Indiana Federation of Dentists, __U.S.__, 106 S.Ct. 2009 (1986), the trial court in Wilk properly recognized the anti-competitive purpose and anti-competitive effects of defendants' boycott. Specifically, the court in Wilk

made the following statements which are in direct conflict with the rulings below in this action:

> "Whether or not the elimination of competition per se was consciously intended, that was the natural result of an intent to destroy a competitor. The AMA's market power is also relevant..." "Given the substantial market power of AMA members and the specific intent of the AMA, a substantial adverse effect on competition is evident. Despite the fact that the number of chiropractic schools, the number of chiropractors, and the number of patient visits to chiropractors grew during the boycott, ...the boycott was successful."

Wilk at pgs. 22-23, Trade Cases at pg. 58,539.

IV. THE PETITION FOR WRIT OF CERTIORARI DOES NOT CHALLENGE THE FACT FINDINGS OF THE TRIAL COURT

Contrary to CCE's suggestion, (Brief in opp. pg. 6) the petitioners do not challenge the findings of fact of the trial court. The petition relies upon the findings of facts of the trial court and the uncontradicted documentary evidence. Near the outset of its order, the trial court stated that the facts were not in dispute:

> "The evidence presented at trial--especially the documentary evidence--was voluminous. Nonetheless, most of the facts are undisputed and in any event are not as complex as the length of the record might indicate" (Appendix pg. 4a)

Accordingly, respondents effort (Brief in Opp. pg. 12) to argue the "two-court" rule is misplaced.

V. THE TRIAL COURT FOUND THAT DEFENDANTS HAVE MARKET DOMINANCE

In footnote 3, page 9, of its brief, the CCE tries to dispute a significant finding of fact of the trial court. CCE's suggestion that the court did not find defendants had "dominance" is wrong on the face of the trial court's order. After describing the defendants as pro-diagnostic forces (App. pgs. 4a - 6a), the court expressly stated:

> "Over the past ten to fifteen years, the pro-diagnostic forces have achieved dominance in the profession. (emphasis added) (App. pg. 6a)

Later, the Court explained that the defendants' "dominance" caused the enrollment and financial health of Sherman to decline and caused the CCE colleges to prosper. (App. 13a - 14a)

VI. DEFENDANTS' CONDUCT CONSTITUTED A HORIZONTAL COMBINATION

For the first time in this case, all the defendants argue that their boycott does not restrain trade because they were not "horizontal" competitors of plaintiffs. The argument is without merit. The undisputed facts show that plaintiff SCASA is a chiropractic accrediting agency. Defendant, CCE, is a competing chiropractic accrediting agency. CCE is composed of chiropractic colleges that compete with plaintiff, Sherman College. Defendant, Sid Williams, is a chiropractor and president of a competing chiropractic college. The ACA is an organization of chiropractors that compete with graduates of plaintiff, Sherman College. Defendant, NBCE, is composed of competing chiropractors and educators from competing colleges.

Defendants' newly asserted defense does not withstand even a quick readying of

the numerous section one cases involving standard-setting and professional organizations, which clearly recognize professional organizations as combinations of competing members. See, American Society of Mechanical Engineers v. Hydrolevel Corp., 456 U.S. 556, 102 S.Ct. 1935 (1982); Federal Trade Commission v. Indiana Federation of Dentists, ___U.S.___, 106 S.Ct. 2009 (1986); National Society of Professional Engineers v. United States, 435 U.S. 679 (1978); NCAA v. Board of Regents 468 U.S. 85, 104 S. Ct. 2948 (1984); U.S. v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980).

VII. STATE TORT DECISIONS DO NOT JUSTIFY FEDERAL ANTITRUST VIOLATIONS

In its brief, the ACA argues that it had good reasons to restrain Sherman's ability to compete. Page four of its brief cites numerous malpractice cases against

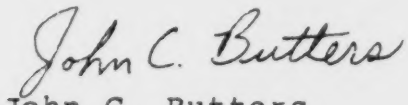
chiropractors. Apparently, ACA is arguing that its boycott is justified because chiropractors in the past have been sued for not doing what state law forbids them to do --to diagnose and treat disease, which is the practice of medicine. The malpractice argument is irrelevant under antitrust law. National Society of Professional Engineers v. United States, 435 U.S. 679 (1978); Wilk v. American Medical Assn., 719 F.2d 207 (7th Cir. 1983), cert. denied 104 S.Ct. 2399.

Finally, the facts of the malpractice cases do not challenge traditional chiropractic taught at Sherman, and defendants have not cited a single malpractice case against a Sherman graduate. Neither at trial nor presently[1] do defendants validly dispute that their organizations forced chiropractic colleges to teach chiropractors to practice of medicine.

CONCLUSION

The uncontroverted facts, as shown in the trial court's order, demonstrate the difficulty lower courts have had in dealing with antitrust challenges to professional standard-setting activity. The lower courts are in conflict and the issue is exceedingly important. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,



John C. Butters
Counsel of Record

1515 First Atlanta Tower
Atlanta, Georgia 30383
(404) 688-0440

September 21, 1987

FOOTNOTE 1.

In an article, "The Final Push" in the July/August 1987 issue of "Today's Chiropractic", defendant Sid Williams openly admits that: "Now, as the chiropractic educational institutions come increasingly under ACA influenced reform, emphasis is shifting away from philosophy in science of chiropractic toward an allopatic whole body treatment orientation"..."[I]t will be a relatively short time before the chiropractic associations will be meeting the same standards as medical doctors, to include college and ultimate, unnecessary internship." (emphasis added)